NO. 20668

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMELLO RAYMOND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,
JOHN A. MITCHELL,
Assistant U. S. Attorney,

325 West "F" Street,
San Diego, California 92101

Attorneys for Appellee,
United States of America.

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San Diego, California 92101

Attorneys for Appellee,
United States of America.

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APPELLEE'S BRIEF

I

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

On July 22, 1964, the Federal Grand Jury for the Southern District of California, Southern Division [1], returned a three-count indictment (No. 33221-SD) charging the defendant with violations of Title 18, United States Code, Section 1952 (use of facility in interstate commerce in aid of racketeering) [C. T. 2-4]. [2]

On August 31, 1964, the defendant entered his plea of not

1/ On September 19, 1966 the Southern Division became the Southern District of California by Act of Congress.

2/ "C. T." refers to Clerk's Transcript.

guilty to all Counts and on February 9, 1965, jury trial commenced before the Honorable James M. Carter. On February 11, 1965, the defendant was acquitted as to Counts One and Two and convicted as to Count Three [C. T. 18-20; R. T. 2]. [3/] On March 19, 1965, the defendant was sentenced on Count Three to a five year period of incarceration pursuant to the provisions of Title 18, United States Code, Section 4208(a)(2). A Notice of Appeal was filed on March 26, 1965 [C. T. 34-36].

The jurisdiction of the United States District Court for the Southern District of California, Southern Division, was based on Title 18, United States Code, Sections 1952 and 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES AND RULES INVOLVED

A. STATUTES

Title 18, United States Code, Section 1952(a) reads in pertinent part as follows:

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

"(a) Whoever travels in interstate or foreign

3/ "R. T." refers to Reporter's Transcript.

commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to . . . .

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in . . . [subparagraph (3)] . . . shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving . . . prostitution offenses in violation of the laws of the State in which they are committed or of the United States, ..."

Section 201.300 of the Nevada Statutes reads in pertinent part as follows:

"201.300 Pandering: Definition; punishment.

"Any person who:

"1. Shall induce, persuade, encourage, inveigle or entice a female person to become a prostitute; or . . . .

"2. By threats, violence, or by any device or scheme shall cause, induce, persuade, encourage, take, place, harbor, inveigle or entice, a female person to become an inmate of a house of prostitution, or assignation

place, or any place where prostitution is practiced encouraged or allowed; . . . .

"6. Shall receive, or give or agree to receive or give any money or thing of value for procuring or attempting to procure any female person to become a prostitute or to come into this state or leave this state for the purpose of prostitution, ..."

Section 175.250 of the Nevada Statutes reads in pertinent part as follows:

"175.250 Abortion; enticing female for prostitution: Corroboration of woman's testimony. Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away any female of previous chaste character, for the purpose of prostitution, or aiding or assisting therein, the defendant shall not be convicted upon the testimony of the woman upon or with whom the offense shall have been committed, unless she is corroborated by other evidence."

B. RULES

Rule 18(d) of the Court of Appeals for the Ninth Circuit reads in pertinent part as follows:

"Rule 18, Briefs.

"(d) . . . When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at the trial . . . ."

Rule 30, of the Federal Rules of Criminal Procedure reads in pertinent part as follows:

"Rule 30. Instructions

" . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds of his objection. . . ."

III

STATEMENT OF THE CASE

A. QUESTIONS PRESENTED

In order to avoid needless repetition, the appellee will analyze the propositions presented by the appellant's brief in the following order:

1. Did the Trial Court commit error in its instructions to the jury?

2. Do the facts in this case show entrapment of the

appellant as a matter of law?

3. Did the Trial Court commit error in failing to compel Lee Dallas to name (A) the individual that introduced her to the F. B. I. and (b) the individual that asked her to locate Tracy?

B. STATEMENT OF FACTS

Lee Dallas, a widow with seven children, who had worked as a prostitute in San Diego, was contacted in early 1964 by a man who wanted her to locate a friend named Tracy (also called Shirley). This man, who was married with four children, had paid approximately $2000 in hospital bills for Tracy and now wanted Lee Dallas to locate Tracy so that the debt could be repaid [R. T. 26, 48, 60-63].

During the last part of May or early June of 1964, Lee Dallas who resided in San Diego, was visiting in Las Vegas, Nevada, with her mother. In Las Vegas she attempted to locate Tracy and while staying at the Stardust Hotel she was told by a bellboy that she could locate Tracy by calling the defendant at his telephone number in Las Vegas [R. T. 26, 60-63].

On approximately June 11, 1964, Lee Dallas placed a telephone call in San Diego, California, to the defendant at the Tahiti Motel, Las Vegas, Nevada. The defendant was not available at that time but shortly afterward he called Lee Dallas collect in San Diego, California. She told the defendant that she was trying to locate a girl named Tracy or Shirley. The defendant told her that he would

have her call [R. T. 7-10, 27, 51, 53, 58; Exhibit Four].

A few days later Lee Dallas had another telephone conversation with the defendant. At this time the defendant asked if she was interested in coming to Las Vegas and working. He told her to call Shirley that afternoon and not to tell Shirley that they had talked [R. T. 10-12, 51].

Lee Dallas then called Shirley and told her she was looking for work and asked if she could help. Shirley told her that she could stay with her and the defendant. The defendant called Lee Dallas on the same afternoon from Las Vegas. The defendant told her that she could come up to Las Vegas and stay with Shirley and him in their apartment. When asked what he would do with two women, the defendant responded that he would do the same as he was doing with one. The defendant also inquired as to whether or not he would have to have her confined to her room. He told her to bring all of her clothes but that she could take them off when she arrived. When the defendant was informed that her car was broken down he told her where to get the car repaired and suggested that she pay the mechanics by allowing them to take it out in trade [R. T. 12-14, 51].

Special Agent H. Edgar Strahl of the Federal Bureau of Investigation customarily discussed current intelligence matters with Lt. Earl Cochran from the Vice Squad of the local police department in San Diego. In one of these discussions, it was mentioned that Lee Dallas might be of some aid to the Federal Bureau of Investigation regarding violations of federal law. There was an

inquiry pending regarding Lee Dallas by the Federal Bureau of Investigation but this inquiry did not relate to the defendant in this case [R. T. 104-105, 107-108, 111-112, 119-121].

Special Agent Strahl called Lee Dallas by phone and subsequently met her on June 7, 1964 at Oscar's Drive-In Restaurant in San Diego, California. This is the first time that Special Agent Strahl had met Lee Dallas. A discussion took place regarding prostitution in San Diego. During this discussion Special Agent Strahl learned of the prior conversations between Lee Dallas and the defendant. Lee Dallas agreed to abide by any instructions or any encouragement concerning travel that she received from the defendant. It was further agreed that actual prostitution would be the point at which she would separate from the defendant [R. T. 59, 103-104, 106-108, 110, 112].

On June 18, 1964, Special Agent Strahl and another Special Agent went to the residence of Lee Dallas in San Diego. They knocked on the door and were admitted by Lee Dallas who was using her telephone. At her request Special Agent Strahl picked up an extension and listened to the conversation. This conversation began shortly before the Special Agents arrived as a result of the defendant calling Lee Dallas from Las Vegas. The defendant asked Lee Dallas to come to Las Vegas immediately and she said she would come real soon. The defendant asked her to come today. The defendant told her to bring all of her clothes and Lee Dallas said that she would have to have her clothes to wear. The defendant told her that she could take her clothes off when she got to Las

Vegas. Lee Dallas told the defendant that her car was acting up and he told her where to take the car for repairs and that she could take the cost of repairs out in service. The defendant told Lee Dallas that she could stay with Shirley and the defendant in their apartment. She asked what he would do with two women and he said the same as he was doing with one. The defendant also asked her whether or not he would have to have someone watching her to keep her in her room. The defendant also asked whether or not she was "chippying" around on him and stepping out. The defendant asked Lee Dallas whether or not she would rather wait until the 27th to come to Las Vegas but she said she would come at the earliest possible date. He suggested that she contact Shirley by phone but told her not to mention their conversation [R. T. 10-14, 16-18, 51, 100-102, 110-112, 114].

On June 19, 1964, the defendant in the early afternoon, called Lee Dallas from Las Vegas. [4/] They discussed the fact that her car was broken down and she still had been unable to get it repaired; the fact that she was drawing unemployment; whether or not she had been "chippying" on him; the fact that the defendant had a great deal of business and he had to call another girl to take care of it; the fact that she would pose as the sister-in-law of Tracy in Las Vegas; whether or not Lee Dallas would be the cause of a quarrel between the three of them when they were together; whether

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4/ This telephone call was taped by Special Agents of the FBI with the permission of Lee Dallas [R. T. 19-21, 29, 31-32, 34-35, 112-114; Exhibits One and Eleven].

or not the defendant would have to confine her; a general discussion concerning the hours she would be required to work; that she was going to be his "old lady"; [5] that the defendant was going to do the same thing with two women that he did with one; a prior prostitution experience of Lee Dallas; how she was to handle Tracy; and when she was to arrive in Las Vegas. The defendant suggested that she call Tracy and tell her that she was now part of the family. The call was concluded by the defendant telling his "honey" to "hurry" to Las Vegas [R. T. 19-21, 29, 31-32, 34-35, 77-78, 112-114; Exhibits One, Five and Eleven].

Subsequent to this call, a friend rented a car for Lee Dallas so that she could make the trip to Las Vegas. Lee Dallas had agreed to cooperate with the FBI in order to make a positive identification of the defendant [R. T. 43, 109].

On June 23, 1964, Lee Dallas who had traveled from San Diego to Las Vegas, met at approximately 8:30 a. m. with Special Agents of the Federal Bureau of Investigation at the Fremont Hotel. A short conversation took place and it was agreed that they would meet at the Fremont Hotel again at 2:45 p. m. [R. T. 90-91].

At approximately 2:45 p. m. the Special Agents again met with Lee Dallas. She placed a phone call to the defendant and told him that she was outside of Las Vegas. The defendant told her to drive to the Tahiti Motel in Las Vegas and gave her directions

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[5] In the language of the street "old lady" means a woman that a man is using to make money for him by prostitution [R. T. 41].

R. T. 45-46, 51, 90-92].

Lee Dallas drove to the Tahiti Motel and parked the car. The defendant came out of the motel and got into her car. They talked for a few minutes, then they went into the motel office. The defendant told her to register and she did using an assumed name. She was told by the defendant that she would not have to pay for her room. While in the motel office she was introduced to Bert and Sue. It was disclosed that Sue was a prostitute and Bert was a clerk who also took phone calls making appointments [R. T. 46-47, 93-95, 98].

After remaining in the office for five or six minutes the defendant and Lee Dallas came out of the office and drove to the rear of the motel. They went into Room 129. At this time the defendant explained his operation. He said that he would make dates for her and that the dates were to be taken to Room 129 or she could go to the customer's rooms. The charge was twenty dollars and up for the dates. Lee Dallas was told to give him all of the money that she received and that he would furnish her with incidentals. Lee Dallas, at the defendant's request, disrobed and put on a bathing suit. The defendant told her that she would do. The defendant then carried a lounge chair into her room and Lee Dallas carried her clothes from her car into her room [R. T. 47-50, 95, 98].

The defendant left and approximately thirty minutes later returned with Tracy. They again discussed the operation and the defendant asked Lee Dallas whether or not she took part in abnormal sexual activities with men and women. Lee Dallas said that she

ot but Tracy and the defendant told her they would teach her and
iat she would enjoy it. Lee Dallas was also told that she was re-
uired to check out with them or with the desk clerk [R. T. 47-50,
5, 98].

The defendant and Tracy left and Lee Dallas stayed in her
oom for two or three hours. Then the defendant called and told
er that he would be by around three in the morning to try her out.
hortly after the phone call, Lee Dallas left the motel, met with
pecial Agents of the FBI, gambled for a while, and then returned
) San Diego [R. T. 50-52, 96].

Some time after Lee Dallas had returned from Las Vegas
he was again contacted by Special Agents of the FBI and paid $50
)r expenses [R. T. 44, 57].

IV

SUMMARY OF ARGUMENT

The Honorable James M. Carter did not commit error in the
ury instructions. The jury was properly instructed concerning
urplusage in the Indictment and these instructions did not erron-
ously emphasize any evidence. The jury was properly instructed
oncerning applicable Nevada law. The Trial Court properly in-
tructed the jury concerning the defense of entrapment.

The facts in this case clearly reveal that the appellant was
ot entrapped by federal officials or anyone else.

Finally there is no indication in this record of any valid

reason to require that Lee Dallas name the individual that directly or indirectly introduced her to the FBI and the individual who asked her to locate Tracy.

V

ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT ERROR IN ITS INSTRUCTIONS TO THE JURY.

On February 10, 1965, jury instructions were discussed in the Trial Court's chambers. At that time counsel for the appellant did not indicate any objections to the instructions to be given [R. T. 130-143]. On February 11, 1965, jury instructions were again discussed in the chambers of the Trial Court. At this time, though the record is not clear, counsel for the appellant objected generally to the instruction concerning surplusage in the Indictment [R. T. 186-188]. Following the jury instructions, counsel for the appellant incorporated the prior objection and made a further objection to the surplusage instruction [R. T. 213-214].

A juror then addressed a question regarding Nevada law to the Trial Court and the Trial Court again explained Nevada law. Counsel for the appellant made no further objection and stated that he thought the Trial Court's statement was very good [R. T. 214-215].

The appellant now contends that the Honorable James M.

Carter committed error in his charge of the jury.

Rule 18(d) of the Rules of the United States Court of Appeals for the Ninth Circuit reads in pertinent part as follows:

"Rule 18(d) Briefs.

"(d) . . . when the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions refused, together with the grounds of the objections urged at the trial . . . ." [Emphasis added].

In light of the foregoing rule, the Government respectfully suggests that the error urged relating to the instructions of the Trial Court has not been properly raised for this Court's consideration.

In addition, Rule 30 of the Federal Rules of Criminal Procedure reads, in pertinent part, as follows:

"Rule 30. Instructions

" . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

The only objection which may have complied with Rule 30, though that is questionable, is the general objection to the surplusage instruction. The trial record is barren of any other objection made

by the appellant to the instructions of the Trial Court.

The Government respectfully submits that Rule 30, if strictly interpreted, precludes this Court from considering the error alleged by the appellant as to the instructions of the Trial Court.

If Rule 30 is not strictly interpreted, then the case of Walker v. United States (9 Cir. 1962), 298 F. 2d 217, must be considered. In the Walker case it was stated that:

> "Having failed to comply with Rule 30, not contending that plain error had been committed, and because the instructions taken as a whole and read together do not appear prejudicial, the appellants are barred from presenting this issue on appeal." (p. 225).

This Court in reviewing the error alleged as to the instructions of the Trial Court, must determine whether or not the instructions taken as a whole and read together are prejudicial.

1. The Trial Court's instructions concerning certain language in the Indictment being considered as surplusage was not a violation of the appellant's constitutional rights.

The appellant contends that the Trial Court violated his constitutional rights by instructing the jury that they may ignore the language "of prostitution" in Count Three of the Indictment.

Count Three of the Indictment reads as follows:

> "On or about June 18, 1964, defendant CAMELLO RAYMOND did use a facility in interstate commerce, to wit, a telephone line from Las Vegas, Nevada to San Diego, California, within the Southern Division of

the Southern District of California, with the intent to promote, carry on, and facilitate the promotion and carrying on of prostitution, unlawful activity and thereafter attempted to perform the promotion and carrying on of prostitution, in violation of the laws of Nevada." [C. T. 4; emphasis added].

The Trial Court instructed the jury, in part, that:

". . . I will first read the counts of the Indictment as they stand, and subsequently I have another instruction in which I state to you that you may disregard two words in each of the counts as being surplusage. But at this time I will read the counts of the Indictment as they appear. I am not amending the Indictment. No Indictment can be amended. However, the Court may instruct the jury that it may disregard certain words as being surplusage. . . ." [R. T. 196-197].

After further general instructions the Trial Court then instructed the jury that:

". . . Section 201.300 of the Laws of Nevada provides: Any person who shall induce, persuade, encourage, inveigle or entice a female person to become a prostitute, or by any device or scheme shall induce, persuade, encourage or entice a female person to become an inmate of a house of prostitution or assignation place or any place where prostitution is practiced, encouraged,

or allowed, or a person who shall agree to receive or give any money or thing of value for attempting to procure any female person to become a prostitute or to come into this state for the purpose of prostitution, shall be guilty of an offense.

"Now, having in mind that there is no prohibition against prostitution in Nevada but that there are statutes regulating it, we come back to the indictment in the case and you will note that each count charges the use of an interstate facility, a telephone line, with the intent to promote, carry on and facilitate the promotion and carrying on of prostitution, an unlawful activity. The Court now instructs you that you may disregard those two words 'of prostitution' in that part of the Indictment as being surplusage. They appear on line 25 of Count One, and to point them out I will, with a pencil, put parentheses around them. They appear in Count Two on line 8. All the counts, of course, are in similar language, except for the date. And those words appear on Line 8 of Count Three. So if you decide to disregard those two words as being surplusage, then the Indictment charges the use of a telephone facility with the intent to promote, carry on and facilitate the promotion and carrying on of an unlawful activity, and thereafter attempted to perform the promotion and carrying on of prostitution,

in violation of the Laws of Nevada.

"So, as read, if you decide to disregard the two words I have pointed out as being surplusage, each count in the Indictment refers to attempting to perform promotion and carrying on of an unlawful activity, and that the defendant thereafter attempted to perform the promotion and carrying on of prostitution, in violation of the laws of Nevada, and not merely the bald statement of promoting prostitution. This may sound like a distinction without a difference. But if the defendant is charged with merely promoting the carrying on of prostitution, there is nothing illegal in carrying on prostitution in Nevada. But if he is charged with carrying on the performing of prostitution contrary to the laws of Nevada, then knowing that Nevada says prostitution is legal but that it must be carried on in certain ways and that certain things may not be done, then the Indictment refers to this matter of performing and carrying on prostitution in violation of the laws of Nevada . . . that is, in a way that Nevada has prohibited.

"I don't know whether I have made myself clear or not. You will have the Indictment with you, and I am merely instructing you, not that you must, but that you may disregard the two words 'of prostitution' where they first appear in each count, which I have

noted with a pencil mark. Now the same words appear later on in the Indictment, but where they appear later they are followed by the words 'in violation of the laws of Nevada.' Each count later on refers to carrying on prostitution, but is then followed by the language 'in violation of the laws of Nevada.'" [R. T. 201-203; emphasis added].

In response to a juror's question the Trial Court stated that: ". . . THE COURT: I told you that prostitution may go on in Nevada, but I read you the laws of Nevada, which provide -- I am not going to re-read them to you, but which provided that certain things might not be done with reference to persuading or enticing women to become prostitutes. In other words, if you could summarize it in a word or two, Nevada has said prostitution is legal, but they have passed a whole series of laws about how women may or may not become prostitutes and what people may do to entice or persuade them to enter a house of prostitution. So if there is any violation of the laws of Nevada, it is not the carrying on of prostitution. It is the question whether or not any person was enticed or persuaded to become a prostitute, or whether or not there was an agreement to give or to receive money to procure a female to become a prostitute or to come

into the state." [R. T. 215].

It is fundamental that a Trial Court cannot amend an indictment and cause a defendant to be tried on a charge which was not originally indicted. Ex Parte Bain (1887), 121 U. S. 1; and Stirone v. United States (1960), 361 U. S. 212. It has also been held that part of the indictment which is surplusage may be rejected and ignored as a useless, innocuous averment without constituting an amendment to the indictment. Ford v. United States (1927), 273 U. S. 593. 6/

The issue before this Court is whether or not the Trial Court amended the indictment or in the alternative instructed the jury to ignore surplusage.

When Count Three of the Indictment is analyzed it is clear that the language "of prostitution" was surplusage. When that language is stricken all of the elements of the offense are charged clearly and concisely. "Of prostitution" was unnecessary and superfluous.

6/ See also: Marsh v. United States (5 Cir. 1965), 344 F. 2d 317; Vincent v. United States (8 Cir. 1964), 337 F. 2d 891; United States v. Spector (7 Cir. 1963), 326 F. 2d 345; Castle v. United States (5 Cir. 1961), 257 F. 2d 657; Soper v. United States (9 Cir. 1955), 220 F. 2d 158; and Cromer v. United States (D. C. Cir. 1944), 142 F. 2d 697.

2. THE TRIAL COURT'S INSTRUCTION CONCERNING CERTAIN LANGUAGE IN THE INDICTMENT BEING CONSIDERED AS SURPLUSAGE WAS NOT ERROR BECAUSE OF THE TIME IT WAS GIVEN; AND DID NOT ERRONEOUSLY EMPHASIZE EVIDENCE.

Counsel for the appellant further contends that the Trial Court's instruction concerning the words "of prostitution", in Count Three of the Indictment was error because of the time it was given and because it erroneously emphasized certain evidence.

There is no showing in this case that the Trial Court's jury instructions striking out surplusage in any way emphasized evidence of any kind to the detriment of the appellant.

Edgerton v. United States (9 Cir. 1944), 143 F. 2d 697 is not applicable. Two of the judges clearly limited their opinions to the surplusage aspect of the case, and did not concur in that portion of the opinion concerning the effect of the time when the surplusage was stricken.

3. THE TRIAL COURT DID NOT ERRONEOUSLY INSTRUCT THE JURY CONCERNING APPLICABLE NEVADA LAW.

The appellant now contends, for the first time, that the Trial Court erred in (A) failing to interpret Section 201.300 of the Nevada Statutes and (B) failing to require that the testimony of Lee

)allas be corroborated pursuant to Section 175. 250 of the Nevada Statutes.

The Trial Court in chambers discussed with counsel the applicability of Nevada Law and in particular Section 201. 300. No objection to the instructions concerning Nevada Laws were made by experienced counsel representing the appellant [R. T. 130-144, 214]. The provisions of Rule 18 of this Court and Rule 30 of the Federal Rules of Criminal Procedure preclude consideration of this alleged error.

Notwithstanding the foregoing analysis it is clear that the Trial Court was not required to go into detail concerning Section 201. 300 while instructing the jury. This statute is clear on its face and the jury properly decided that the appellant violated the statute.

Nevada Revised Statute 175. 250 was not applicable to this case. State procedural rules concerning corroboration of an accomplice do not apply in Federal Court. Caminetti v. United States (1966), 242 U. S. 470; and Torres v. United States (9 Cir. 1965), 353 F. 2d 734.

It is clear that Section 175. 250 applies only to a fact situation concerning a defendant who inveigles, entices, or takes away a woman of chaste character for the purpose of prostitution. This particular crime is charged in a separate paragraph in Section 201. 300 of the Nevada Statutes and was not one of the Nevada crimes that the Trial Court in our case presented to the jury. Therefore, even in Nevada, Section 175. 250 is not applicable where the violation alleged relates to paragraphs one, two and six of Section 201. 300.

In any event, the record in this case shows that the testimony of Lee Dallas was corroborated by the testimony of the Special Agents of the Federal Bureau of Investigation and the tape recording concerning the telephone conversations of June 19, 1964.

The Government respectfully submits that the Trial Court properly instructed the jury concerning the law of the State of Nevada.

4. THE TRIAL COURT DID NOT ERRONEOUSLY INSTRUCT THE JURY CONCERNING ENTRAPMENT.

Again, for the first time, counsel for the appellant presents the contention that the Trial Court committed error in the jury instructions concerning entrapment. No objection was made and pursuant to the provisions of Rule 18 of this Court and Rule 30 of the Federal Rules of Criminal Procedure, this contention should not be considered by this Court.

If this Court does decide to consider this contention then the instructions given by the Trial Court and the applicable case law must be analyzed.

The Trial Court instructed the jury regarding entrapment as follows:

"The Defense has raised the defense of entrapment. The law recognizes two kinds of entrapment -- unlawful entrapment, and lawful entrapment. Where

a person has no previous intent or purpose to violate the law but is induced or persuaded by law-enforcement officers to commit a crime, he is entrapped; he is entitled to the defense of entrapment, unlawful entrapment, because the law, as a matter of policy, forbids the conviction in such case. On the other hand, where a person has already the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, for this is lawful entrapment.

"If, then, the Jury find from the evidence that before anything at all occurred respecting the alleged offenses involved in this case the accused was ready and willing to commit crimes such as those charged in the Indictment whenever opportunity offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment. If, on the other hand, the Jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged and did so only because he was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person and the defense of unlawful entrapment is a good defense and the Jury should acquit the accused.

"Now the evidence shows -- and you are the

sole judges of the evidence, but the evidence shows that the FBI entered this case on or about June 17th. You are the finders of fact. I am merely telling you what I think the evidence shows. Therefore, the defense of entrapment, if it is good at all, would only be good as to charges that concerned activities of of the defendant after the date that the Agents entered the case and would not be an available defense to offenses that occurred before there was any contact by the Agents with any of the parties in this case." [R. T. 203-204]

The instruction given by the Trial Court in form and in ubstance has been approved time and time again by this and ther Federal Courts. Sherman v. United States, (1958), 356 US 69; Silva v. United States, (9 Cir. 1954), 212 F. 2d 320; Trice . United States (9 Cir. 1954), 211 F. 2d 513; and 27 F. R. D. 39, .12.

The Government respectfully submits that the Trial Court's nstruction with respect to entrapment was not error.

B. THE FACTS IN THIS CASE DO NOT SHOW ENTRAPMENT OF THE APPELLANT AS A MATTER OF LAW.

Counsel for the appellant contends that the facts in this case show that the appellant was entrapped as a matter of law.

As indicated by the "Statement of Facts", the evidence when viewed in the light most favorable to the Government [7/] shows that Lee Dallas was contacted in early 1964 by a man who wanted her to locate a friend named Tracy (Shirley) in order that he might collect $2000 that was due and owing. Lee Dallas while in Las Vegas visiting with her mother obtained the appellant's phone number in Las Vegas who would know the location of Tracy (Shirley). Subsequently, Lee Dallas contacted the appellant in Las Vegas on or about June 11, 1964, attempting to locate Tracy (Shirley).

The Federal Bureau of Investigation came into this case when Special Agent Strahl contacted Lee Dallas on or about June 17, 1964. At this meeting Lee Dallas mentioned for the first time prior telephone discussions with the appellant. The record clearly indicates that the Special Agent did not contact Lee Dallas regarding the appellant but rather his name came up in the first discussion for the first time.

The record also indicates that prior to the first meeting

7/ At this stage in the proceedings, the evidence must be viewed in the light most favorable to the United States. Glasser v. United States (1942), 315 U.S. 60, and Byrne v. United States (9 Cir. 1964), 327 F. 2d 825.

vith Special Agents, the appellant had asked Lee Dallas to come o Las Vegas and work and had told Lee Dallas that she could stay vith Shirley and him, that he would do the same thing with two vomen that he was doing with one, that he wished to know whether or not she had to be confined, that she should bring all of her clothes with her and that she could pay for necessary repairs to ner vehicle by servicing the mechanics. Obviously the appellant vanted Lee Dallas to work for him as a prostitute.

Subsequent to the first meeting, Special Agents on or about June 18, 1964, overheard part of a telephone conversation between the appellant and Lee Dallas and on June 19, 1964, taped a telephone conversation between the appellant and Lee Dallas. The two conversations clearly indicate that the appellant wished Lee Dallas to come to Las Vegas and work for him as a prostitute. This conclusion is clearly substantiated by the tape recording and the subsequent Las Vegas activity.

It must be noted that there is no indication in this record that the person who asked Lee Dallas to locate Tracy (Shirley) is the same person who, directly or indirectly, introduced her to Special Agents of the Federal Bureau of Investigation. This record clearly shows that Lee Dallas first came to the attention of Special Agents of the FBI as a result of information provided by an officer of the local vice squad.

There can be no doubt in this case that the appellant had prior intent and purpose to violate the law. Further, the appellant vas not induced or persuaded by law enforcement officers to

commit a crime. Not only did the appellant have the readiness and willingness to break the law, he already had violated the law when Special Agents of the Federal Bureau of Investigation were informed of his telephone conversation with Lee Dallas.

Federal officers may have provided a favorable opportunity but they clearly did not induce or persuade the appellant, who was pimping for at least one woman, to commit a crime. Sherman v. United States (1958), 356 U.S. 369; Silva v. United States (9 Cir. 1954), 212 F.2d 422; Trice v. United States (9 Cir. 1954), 211 F.2d 513; and 27 F.R.D. 39, 4.12.

C. THE TRIAL COURT DID NOT COMMIT ERROR IN FAILING TO COMPEL LEE DALLAS TO NAME (1) THE INDIVIDUAL THAT INTRODUCED HER TO THE FBI AND (2) THE INDIVIDUAL THAT ASKED HER TO LOCATE TRACY.

Counsel for the appellant contends that the Trial Court erred in failing to compel Lee Dallas to disclose the identity of a source of information.

At the Trial, Counsel for the appellant, regarding foundation for the tape recording, examined Lee Dallas on voir dire [R.T. 22-30] and in pertinent part the following occurred:

"BY MR. WHELAN:

"Q. When did you first meet these FBI agents?

"A. Sometime in June. I don't know the exact date.

"Q. What is your best approximation?

"A. Around the 15th.

"Q. Do you think you met them around the 15th?

"A. Yes.

"Q. How did you happen to meet them?

"A. Through a personal friend of mine.

"Q. Through a what?

"A. A personal friend of mine.

"Q. What was his name?

"A. I would rather not say.

"Q. Was it Malley Cornell?

"A. I would rather not answer.

"Q. What's that?

"A. I would rather not answer names.

"MR. WHELAN: I think, if the Court please, she is required to answer.

"MR. SIROTA: I don't believe so, your Honor. There is no sense bringing in people not connected with this. They have a reputation in the community.

"THE COURT: Unless you can make some showing as to why it would be material, I will sustain the objection, without prejudice to further inquiry." [R. T. 22-23]

At a later point in the trial, counsel for the appellant asked the following questions, during cross examination of Lee Dallas, and received the following answers:

"Q. But who is the man that originally asked you to find Tracy?

"A. I don't want to say. He has no connection with this whatsoever. He only wanted to find her to get his money back.

"MR. SIROTA: At this time what Tracy has to do with this case I don't know. It doesn't seem to be very relevant, the questions Mr. Whelan is asking the witness.

"THE COURT: Proceed.

"BY MR. WHELAN:

"Q. I would like to ask a question as to the identity of this gentleman who apparently put the wheels in motion which has resulted in what we are confronted with here now.

"A. This was not the purpose of the man at all. He knew nothing about Ray Carmello.

"MR. WHELAN: I move to strike that voluntary statement of the witness.

"THE COURT: It may go out. But your objection will be overruled at this time, without prejudice to being renewed, if you can lay some proper foundation as to why it should be necessary to reveal this man.

"MR. WHELAN: You mean my question will not be permitted at this time?

"THE COURT: Maybe I didn't say it right.

"MR. WHELAN: You said my objection would be

overruled, and I was not objecting -- I was asking.

"THE COURT: The question will not be -- I will not force the witness to answer the question at this time, without prejudice to a renewal of your request."

[R. T. 63-64]

The foregoing testimony, first on voir dire and then on cross examination, indicates that an individual introduced her to the FBI, whether directly or indirectly we do not know; and an individual asked her to locate Tracy for him. There is no indication in this record that we are dealing with the same person. There is no indication that counsel for the appellant did not know the name of the individual or individuals.

Further the record clearly indicates that the Trial Court would have allowed the questions to be answered if there had been a proper showing by experienced counsel representing the appellant. No showing was made, no offer of proof was presented and there is nothing in this record to indicate the necessity of dragging the names of innocent people before the public in a trial such as this.

When Special Agents of the Federal Bureau of Investigation contacted Lee Dallas, they contacted her on another matter. It was only during the first conversation that the appellant's name was first mentioned. Thus the only informant in this case was Lee Dallas. No other individual or individuals could be classified as an informant.

In the case of Rovario v. United States (1957), 353 U.S. 53,

the guidelines concerning the disclosure and non-disclosure of an informant's identity are presented. That case recognized that in the public interest it is sometimes necessary to conceal the name of an informant. The privilege is not applicable where the identity has once been revealed. The privilege will not apply where it is essential to a fair determination of a case. The important rule has always been that the privilege will not apply where the informant set up the commission of the crime and was present when the crime occurred.

It is clear in this case that the individual who introduced Lee Dallas to the Federal Bureau of Investigation, either directly or indirectly, was not an informant, did not set up the commission of the crime we are dealing with here, and was not present when the crime occurred. A fair determination of this case does not require that the individual's name, which may have been known to counsel for the appellant, be released.

A similar conclusion must be reached when dealing with the name of the individual who asked Lee Dallas to locate Tracy. He did not set up the commission of the crime, was not present when the crime took place, and a fair determination of this case does not require that his infidelity be made a matter of public record in San Diego.

The Government respectfully submits that this record indicates no reasonable basis whereby the names of these individuals should have been revealed in this case.

VI

CONCLUSION

The Government respectfully submits that the conviction of the appellant should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

JOHN A. MITCHELL,
Assistant United States Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ John A. Mitchell

JOHN A. MITCHELL
Assistant United States Attorney